

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

MOHSEN HOSSIENIPOOR, Individually and as
a Managing Agent; MOHSEN HOSSIENIPOOR,
dba, MAGIC SPRAY; MAGIC SPRAY, a
California Business Entity, Form Unknown,

Respondents.

RAUL VEGA MENDOZA,

Complainant.

Case No.

E 200203-G-0527-00-se

E 200203-G-0527-01-s

C 03-04-031

04-02-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it precedential pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a). The Commission corrects the case number used in the Proposed Decision to read: E200203-G-0527-00-se; E200203-G-0527-01-s.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: September 14, 2004

GEORGE WOOVERTON

HERSCHEL ROSENTHAL

CATHERINE F. HALLINAN

JOSEPH JULIAN

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PROPOSED DECISION

Hearing Officer Ann M. Noel heard this matter on behalf of the Fair Employment and Housing Commission on April 20, 2004, and July 21-22, 2004, in San Jose, California. Jennifer Gittisriboongul, Senior Staff Counsel, represented the Department of Fair Employment and Housing. Stanley G. Hilton, Esq., represented respondent Mohsen Hossienipoor and his business Magic Spray. Complainant Raul Vega Mendoza and respondent Mohsen Hossienipoor were present throughout the hearing. Maria D. Cruz served as an interpreter at the hearing.

On July 21, 2004, respondent's counsel filed a brief on respondent's liability. Both parties gave oral closing arguments at the hearing. The Commission received the hearing transcript on August 4, 2004, and the case was submitted on that date.

After consideration of the entire record, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On November 22, 2002, Raul Vega Mendoza (complainant) filed written, verified complaints with the Department of Fair Employment and Housing (Department) against “Moe” Hossienipoor, as an individual, and Magic Spray, alleging that Hossienipoor sexually harassed complainant. On January 29, 2003, complainant filed amended complaints with the Department against Moe Hossienipoor, as an individual, and Magic Spray, correcting a spelling error in the body of the complaints.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On November 20, 2003, Jill C. Peterson, in her then official capacity as Interim Director of the Department, issued an accusation against Mohsen Hossienipoor, individually and as a managing agent; Mohsen Hossienipoor, dba, Magic Spray; and Magic Spray, a California business entity, form unknown (hereafter, collectively referred to as “respondent”). The accusation alleged that respondent Mohsen Hossienipoor (Hoosienipoor), a contractor providing painting services for complainant’s employer, Airtronics Metal Products, Inc. (Airtronics), unlawfully sexually harassed complainant between August 26, 2002, and September 5, 2002. The Department alleged that this conduct violated Government Code section 12940, subdivisions (j)(1) and (j)(4)(A), and Civil Code section 51 (the Unruh Act), as incorporated into the Fair Employment and Housing Act (FEHA or Act) (Gov. Code §12900, et seq.) at Government Code section 12948. The accusation also alleged that respondent: treated complainant disparately on the basis of his sex (male), in violation of Government Code section 12940, subdivision (a); failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring, in violation of Government Code section 12940, subdivision (k); and violated Government Code section 12950. On April 21, 2004, the Department filed an amended accusation deleting the alleged violations of Government Code section 12940, subdivisions (a) and (k).

3. Around February 1988, complainant began working for Airtronics, which is not a party to this action. Complainant worked as a technician assembler in Airtronics’ assembly department. Airtronics is located at 1980 Senter Road, San Jose, California, and manufactures metal parts for computers.

4. In 1998, Hoosienipoor started a company known as Magic Spray (Magic Spray). From 1998 through the date of hearing, Hoosienipoor operated Magic Spray as a sole proprietorship, providing painting services to various companies, including Airtronics. In 2002, Hoosienipoor employed from 14 to 20 employees at Magic Spray. From 1998 through the date of hearing, Magic Spray was located at 625 Wool Creek Road, Suite C, San Jose, California.

5. From 2000 to 2002, Hoosienipoor was frequently on Airtronics’ premises, either to provide painting services in Airtronics’ painting department or to ascertain if Airtronics

had additional painting work for his company. Magic Spray provided painting services to Airtronics through written purchase orders.

6. On Monday, August 26, 2002, at about 2:30 p.m., complainant was working in the Airtronics' assembly department on a stepladder, assembling a large cabinet weighing approximately 2,000 pounds. Hoosienipoor came up behind complainant and grabbed complainant's buttocks. Hoosienipoor's actions caused complainant to lose his balance and he almost fell off the ladder, risking dropping the cabinet on himself. Complainant was extremely upset and told Hoosienipoor not to grab him.

7. Complainant immediately reported Hoosienipoor's actions to his supervisor, Marcos Villaba, telling him not only about the incident that day but also about other frequent physical touchings and verbal comments by Hoosienipoor in the past year. These comments included Hoosienipoor frequently telling complainant that he had a "tight butt." Villaba, in turn, reported complainant's complaints to his supervisor, Kevin Price, work group leader at Airtronics. That same day, Price investigated the complaint and admonished Hoosienipoor not to harass complainant, telling him that Hoosienipoor's grabbing complainant's buttocks would not be tolerated.

8. During the week of August 26, 2002, after complainant had made his complaint, Hoosienipoor was often at Airtronics. When he saw complainant, Hoosienipoor called him a "bitch" and a "crybaby," and told other employees not to touch complainant because he was a "fucking crybaby."

9. On September 4, 2002, at about 1:30 p.m., Hoosienipoor entered Airtronics and told the employees in the assembly area where complainant worked not to touch complainant because "he's a fucking crybaby." Hoosienipoor then called complainant various derogatory names in Spanish, "puto," "baboso" and "bandejo."

10. The next day, September 5, 2002, at about 2:00 p.m., Hoosienipoor passed by complainant and moved toward him as if to grab his buttocks. Complainant immediately turned around and warned Hoosienipoor not to touch him. Hoosienipoor again called complainant a "bandejo." Hoosienipoor also told one of complainant's co-workers that complainant was a "crybaby."

11. On September 6, 2002, complainant talked with Lanita Kupel, an Airtronics human relations department employee, about Hoosienipoor's conduct. Kupel documented complainant's complaints in a memorandum dated September 6, 2002. That same day, Fermin Rodriguez, Airtronics' Vice President, talked with Hoosienipoor about complainant's complaints and then escorted Hoosienipoor from Airtronics' premises. Thereafter, Airtronics did not allow Hoosienipoor to walk onto the Airtronics' premises unescorted.

12. After September 6, 2002, there was no further interaction between Hoosienipoor and complainant.

DETERMINATION OF ISSUES

Liability

The Department's accusation, as amended, alleges that Hoosienipoor sexually harassed complainant in violation of Government Code sections 12940, subdivisions (j)(1) and (j)(4)(A), and 12950, and the Unruh Act, as incorporated in the FEHA, at Government Code section 12948. Respondent denies that Hoosienipoor sexually harassed complainant. Respondent also asserts that, regardless of Hoosienipoor's conduct, he is not liable either under FEHA or the Unruh Act.

A. Respondent's Liability as a FEHA Employer

Respondent is an "employer" under the FEHA.¹ Complainant is a FEHA "employee."² But, it is undisputed that complainant was not *respondent's* employee. Notwithstanding the absence of an employer-employee relationship between respondent and complainant, the Department asserts that respondent is liable as an "employer."

At the time of the acts alleged in the accusation, Government Code section 12940, subdivision (j)(1), provided in relevant part:

It shall be an unlawful employment practice. . .

(j)(1) For an employer . . . or any other person, because of . . . sex . . . to harass an employee Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

The FEHA, at Government Code section 12926, subdivision (d), predicates potential liability on the status of the respondent as an "employer" in "an *employment* relationship between the one who discriminates against another and that other who finds himself the

¹ The FEHA defines "employer" to include "any person regularly employing five or more persons. . . ." (Gov. Code, §12926, subd. (d).) For purposes of harassment claims, Government Code section 12940, subdivision (j)(4)(A), provides in relevant part that an "employer" is any person employing one or more persons. At all times relevant to this action, respondent employed 14 to 20 employees.

² The Commission's regulations provide that an "employee" is an "individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written." (Cal. Code Regs., tit. 2, §7286.6, subd. (b).)

victim of that discrimination.” (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 123, emphasis in original.) Without an employment relationship, there can be no proscribed employment practice and, “[i]f there is no proscribed ‘employment practice,’ the FEHA does not apply.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1135.)

Here, the Department has established no employment relationship between complainant and respondent.³ No employment relationship having been established, respondent is not liable under the FEHA as an employer.⁴

B. Hoosienipoor’s Liability as a FEHA-covered “Person”

The Department also alleges that Hoosienipoor is liable as a FEHA-covered “person” under Government Code section 12940, subdivision (j)(1).⁵ Respondent denies that Hoosienipoor is covered by the Act.

The California Supreme Court, in *Carrisales v. Dept. of Corrections*, *supra*, 21 Cal.4th at p. 1135, held that only persons committing “unlawful employment practices” are liable for acts of sexual harassment under the Act. And, for there to be an “unlawful employment practice” under the Act, there must be an employment relationship between the harasser and the victim of that harassment. (*Vernon v. State of California*, *supra*, 116 Cal.App.4th at p. 123.)

As was the case above, the Department did not establish that Hoosienipoor as a “person” had any employment relationship with complainant. Hoosienipoor was not shown to be an agent or supervisor of Airtronics nor was he complainant’s co-worker. Rather, the facts demonstrated that Hoosienipoor worked for Airtronics as a painting contractor. Thus, under the facts of this case, Hoosienipoor is not liable for his conduct toward complainant as a FEHA-covered “person,” due to the lack of a demonstrated employment relationship between the two.⁶

³ The Department did not assert that respondent was a dual or special employer of complainant. See *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1183. “‘Where an employer sends an employee to do work for another person and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or “general” employer and a second, the “special” employer.’ [Citation omitted.]”

⁴ Having found that respondent is not complainant’s employer, this decision finds no merit in the Department’s contention that respondent is liable for violating Government Code section 12950, requiring California employers to ensure a workplace free of sexual harassment. Thus, that charge will be dismissed.

⁵ The FEHA defines “person” as “one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.” (Gov. Code §12925, subd. (d).)

⁶ Effective 2004, the California Legislature amended Government Code section 12940, subdivision (j)(1), to provide that an employer may be liable for sexual harassment against employees committed by non-employee third parties, under certain circumstances. (Stats. 2003, c. 671 (A.B. 76).) The Legislature, however, extended liability to the employer, not to the non-employee harasser as an individual.

C. Respondent's Liability under the Unruh Act

The Department also alleges that respondent is liable under the Unruh Act, Civil Code section 51, as incorporated into the FEHA under Government Code section 12948. Respondent denies that the Unruh Act applies.

Civil Code section 51 provides in relevant part that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Government Code section 12948 provides in relevant part that:

It is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 . . . of the Civil Code.

The Unruh Act uses the term “‘business establishment’ in the broadest sense reasonably possible.” (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468.) Respondent, with a fixed business location, regularly employed employees, and a painting services clientele, is an Unruh Act “business establishment.”

The Department asserts that respondent's alleged sexual harassment created a “hostile work environment” for complainant, and that this makes respondent liable under the Unruh Act. The Unruh Act does not cover employment discrimination. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500 [“the concurrent enactment of the [FEHA] indicated a legislative intent to exclude the subject of discrimination in employment from the [Unruh] act”]; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 83, fn. 12; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 77; *Sprewell v. Golden State Warriors* (2001) 266 F.3d 979, 989.)

The Unruh Act covers discrimination in the supply of services or facilities to clients, patrons, or customers. (*Alcorn v. Anbro Engineering, Inc.*, *supra*, 2 Cal.3d at p. 500.) A business relationship is required. (*Ibid.*) While respondent had a business relationship with complainant's employer, Airtronics, the Department did not argue or establish that complainant had a client, patron, or customer relationship with respondent sufficient to invoke the Unruh Act. The evidence established no business interactions between complainant and Hoosienipoor. Under these facts, the Department did not establish that complainant, as Airtronics' employee, was in a business relationship with respondent or that complainant himself was a “client, patron, or customer” of Hoosienipoor's. (*Ibid.*) Therefore, the Department's section 12948 allegation will be dismissed.

ORDER

The accusation is dismissed.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: September 8, 2004

ANN M. NOEL
Hearing Officer